BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID L. KESSLER Claimant	)	
VS.	)	Docket No. 270,054
COUNTY OF SEDGWICK Self-Insured Respondent	)	

ORDER

The self-insured respondent appealed Administrative Law Judge John D. Clark's Award dated August 14, 2002. The Board heard oral argument on February 21, 2003.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared for the claimant. E. L. Kinch of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered an accidental injury arising out of and in the course of employment on July 8, 1999, and each and every working day thereafter through January 6, 2000.

The sole issue raised on review by both parties is the nature and extent of claimant's disability.

Respondent contends the claimant only suffered a scheduled disability to his left lower extremity and the percentage of functional impairment should be the average of the

ratings provided by Drs. Kenneth A. Jansson, Philip R. Mills, Larry K. Wilkinson and C. Reiff Brown.

Claimant argues that he suffered injury to the whole body and is entitled to a 74 percent work disability from January 7, 2000, to December 31, 2001, and a 63 percent work disability thereafter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award contains a detailed recitation of the facts and evidence in this case. The Board adopts the ALJ's findings of fact and conclusions to the extent that they are not inconsistent with the findings and conclusions expressed herein.

The respondent does not dispute that claimant suffered injury to his knee in the slip and fall incident while fighting a grass fire. But respondent further argues that claimant only suffered a scheduled injury to his left lower extremity. The ALJ adopted the opinions of several doctors, including the court ordered independent medical examiner, who concluded that as a result of an antalgic gait the claimant developed injury to his hip and back.

Drs. Bradley W. Bruner, Joe D. Davison, Pedro A. Murati, Michael H. Munhall and the court appointed medical examiner, Dr. Brown, all concluded that claimant's hip and back problems were the result of antalgic gait and a natural consequence of claimant's knee injury. In his April 11, 2002 report Dr. Brown stated:

> In my opinion this man has suffered a tear of the left medical meniscus and aggravation of pre-existing degenerative arthritic change in the knee. In spite of thorough conservative and surgical treatment he has ongoing symptoms that interfere rather severely with his activity. It is also my opinion that his painful knee results in a limp that has rendered symptomatic probable pre-existing degenerative changes in the lumbosacral area of the spine.[1]

After his surgery the claimant continued to experience problems with his knee which required additional treatment. While receiving this additional treatment the claimant first began to complain of hip and back pain. Claimant noted he gradually began to experience hip and back pain. The delay in onset of symptoms is adequately explained by the medical providers. It is natural that an antalgic gait would require the passage of some time before it would begin to impact upon other parts of the body. The persuasive medical testimony

[1] Brown's IME report at 3.

provides that as claimant favored his left lower extremity he began to gradually experience increased pain in his hip and back.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[2]

The Board agrees with the ALJ's determination claimant suffered an unscheduled injury and concludes claimant suffered injury to his back and hip as a direct and natural consequence of the injury to his knee. The Board further adopts the determination claimant suffered a 16 percent permanent partial functional impairment to the body as a whole.

The ALJ further determined claimant suffered continued injury after he returned to work through his last day of work on January 6, 2000. The claimant returned to light-duty work on October 5, 1999, and never returned to full duty. The medical evidence indicated that claimant's hip and back problems were a natural consequence of the July 8, 1999, work-related injury. Neither claimant nor the medical providers indicated claimant continued to suffer injuries while he performed his light-duty work between October 5, 1999, and his last day worked on January 6, 2000. Stated another way, the hip and back problems were a natural consequence of the knee injury and not the result of new and independent injuries. Consequently, the Board modifies the ALJ's finding that claimant suffered injuries each and every day worked until his last day worked. The Board finds the date of accident is July 8, 1999.

Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[2] *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wages should be based upon ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

After claimant took medical disability retirement on March 28, 2000, he only applied for work at four businesses and then concentrated on self-employment operating a small woodworking business which he conceded operated at a loss for some time. Karen Terrill, a vocational expert, testified that claimant had not made a good faith effort to obtain appropriate employment because only making four applications since March 28, 2000 simply did not demonstrate a good faith effort. The Board agrees and, accordingly, must determine an appropriate post-injury wage based upon all the evidence.

Jerry D. Hardin, a vocational expert, testified that claimant was capable of earning from $280 to $350 per week. Ms. Terrill testified that claimant was capable of earning from $400 to $500 per week. She further noted that claimant initially indicated he was making $250 per week but later called her and said he was making $450 to $500 per week. The evidence indicates that claimant was capable of earning in the range of $280 to $500 per week and consequently the Board imputes a post-injury wage of $390. Based upon claimant's average weekly wage of $1,026.07 this computes to a 62 percent wage loss.

The ALJ determined claimant has a 47 percent task loss. The ALJ's analysis of this component of the work disability formula noted:

> Dr. Davison, Dr. Munhall, Dr. Murati, and Dr. Brunner [sic] all were of the opinion, along with Dr. Brown, that the Claimant's back and hip problems were related to his knee problems. They were all of the opinion that the Claimant had lost the ability to perform 47 percent of the work tasks that the Claimant had performed in the 15

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] Id. at 320.

> years preceding this work-related injury. Dr. Jansson, Dr. Wilkinson, and Dr. Mills did not take into consideration the Claimant's back and hip problems. Therefore this Court finds that the Claimant has lost the ability to perform 47 percent of the work tasks that the Claimant had performed prior to this injury.[6]

The Board agrees and adopts the ALJ's determination claimant has a 47 percent task loss. Averaging the 62 percent wage loss with the 47 percent task loss results in a 54.5 percent work disability. Consequently, the ALJ's Award is modified to reflect claimant suffered a 54.5 percent work disability.

As previously noted, the claimant returned to light-duty work from October 5, 1999, until January 6, 2000. During this time period claimant's permanent partial disability award would be limited to his percentage of functional impairment while he was working and earning at least 90 percent of his average weekly wage. But due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the amount due. Therefore, the award simply uses the final work disability percentage to compute the total number of weeks of permanent partial disability compensation.

AWARD

WHEREFORE, it is the finding of the Board that Administrative Law Judge John D. Clark's Award dated August 14, 2002, should be modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David L. Kessler, and against the self-insured respondent, Sedgwick County for an accidental injury which occurred on July 8, 1999.

The claimant is entitled to 12.58 weeks temporary total disability compensation at the rate of $383 per week or $4,818.14 followed by 226.18 weeks permanent partial compensation at $383 per week or $86,626.94 for a 54.5 percent permanent partial general bodily disability making a total award of $91,445.08.

As of September 30, 2003, there would be due and owing to the claimant 12.58 weeks temporary total compensation at $383 per week in the sum of $4,818.14 plus 208.28 weeks permanent partial compensation at $383 per week in the sum of $79,771.24 for a total due and owing of $84,589.38 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $6,855.70 shall be paid at $383 per week for 17.90 weeks or until further order of the Director.

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[6] Award at 7.

IT IS SO ORDERED.

Dated this 30th day of September 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David H. Farris, Attorney for Claimant
E. L. Kinch, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director